Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *B. C. v. Minister of Employment and Social Development*, 2016 SSTADIS 85

Tribunal File Number: AD-15-984

BETWEEN:

B. C.

Appellant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: February 24, 2016

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Appellant appeals a decision dated August 28, 2015 of the General Division, whereby it summarily dismissed his appeal of a decision denying his second application for a disability pension under the *Canada Pension Plan*. The General Division summarily dismissed the appeal, given that it was satisfied that it did not have a reasonable chance of success.

[2] The Appellant filed an appeal of the decision of the General Division on September 4, 2015 (the "Notice of Appeal"). No leave is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* (DESDA), as there is an appeal as of right when dealing with a summary dismissal from the General Division. Having determined that no further hearing is required, this appeal before me is proceeding pursuant to subsection 37(a) of the *Social Security Tribunal Regulations.*

ISSUES

[3] The issues before me are as follows:

1. Is the appeal *res judicata*?
2. If the appeal is not *res judicata,* did the General Division err in choosing to summarily dismiss the Appellant's appeal?
3. Did the General Division err in determining that the Appellant was unable to cancel his retirement pension in favour of a disability pension under the *Canada Pension Plan?*

HISTORY OF PROCEEDINGS

[4] The key dates are as follows:

(a) August 1952 – birthdate of Appellant (the earnings history produced by the Respondent however indicates a birthdate of 1951);

(b) June 8, 2012 – Respondent received Appellant's application to simultaneously receive both a retirement pension and disability pension under the *Canada Pension Plan;*

(c) July 2012 – the Appellant began receiving a retirement pension under the *Canada Pension Plan;*

(d) October 1, 2012 – the Respondent denied the Appellant's first application for a disability pension under the *Canada Pension Plan* (GD3-46). The Appellant did not seek a reconsideration of the denial of his first application;

(e) October 16, 2013 – the Respondent received the Appellant's second application for a disability pension under the *Canada Pension Plan* (GD3-18 to GD3-21). The Respondent denied the Appellant's second application initially (GD3-17) and upon reconsideration (GD3-9 and GD3-10); and

(f) March 11, 2014 – the Appellant appealed the reconsideration decision to the General Division.

[5] By letter dated July 10, 2015, the General Division gave notice in writing to the Appellant, advising that it was considering summarily dismissing the appeal because:

- You have been receiving a Canada Pension Plan retirement pension since July 2012. Your application for a Canada Pension Plan disability benefit is dated September 3, 2013 and was date stamped as received by Service Canada on October 16, 2013. This means that you applied for a Canada Pension Plan disability benefit more than 15 months after you started receiving your Canada Pension Plan retirement pension.

- Subsection 66.1(1.1) of the Canada Pension Plan (CPP) provides that a retirement pension cannot be cancelled in favour of a disability benefit

where an applicant for a disability pension is in receipt of a retirement pension.

- Subsection 42(2) provides that a person cannot apply for a CPP benefit 15 months or more after receiving a CPP retirement pension.

- Subsection 53(1) of the Department of Human Resources and Skills Development Act (DHRSD Act) states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.

[6] The General Division invited the Appellant to provide detailed written submissions by no later than August 8, 2015, if he believed that the appeal should not be summarily dismissed, and that he should explain why his appeal had a reasonable chance of success.

[7] The Appellant filed submissions on July 17, 2015, advising that he had believed that a payment made to him in July 2012 represented the monthly payment for a Canada Pension Plan disability pension, rather than a retirement pension, as he would not reach 60 years of age until August 2012. He did not think that Service Canada would err in calculating the commencement date of payment of the retirement pension.

[8] The Respondent also filed submissions, on August 20, 2015. The Respondent maintained its position that the retirement pension could not be cancelled in favour of a disability pension when an application for a disability pension was received 15 months or more after retirement benefits had commenced. The Respondent further submitted that the Appellant would not have met the definition of disability under the *Canada Pension Plan* at his minimum qualifying period of December 31, 2011, and therefore would not have been found eligible to receive a disability pension. The Respondent submitted that the medical and documentary evidence showed that the Appellant was working until August 21, 2013, which was well past the minimum qualifying period and therefore inconsistent with a finding of disability under the *Canada Pension Plan.* (I note that earlier correspondence from the Respondent to the Appellant suggests that the Appellant may have stopped working on May 22, 2012, based on the questionnaire completed by him on May 22, 2012 [pages GD3-85 to GD3-91].)

[9] The General Division rendered its decision on August 28, 2015. The General Division found that the Appellant was one month late in applying for the cancellation of his retirement pension in favour of a disability under the Canada Pension Plan or, in other words, he had applied for a disability pension more than 15 months after he started receiving a retirement pension. The General Division did not address the Appellant's submissions that the Respondent ought not to have commenced paying him a retirement pension until September 2012, nor did it address the Respondent's submissions that the Appellant could not be found disabled by his minimum qualifying period of December 31, 2011, as he continued to work until possibly August 21, 2013. The General Division summarily dismissed the appeal.

[10] On September 4, 2015, the Appellant filed an appeal from the summary dismissal decision of the General Division.

SUBMISSIONS

[11] The Appellant submits that both the Respondent and General Division miscalculated 15 months from July 2012. He calculates that 15 months from July 2012 goes to October 2013. He further submits that consideration should be given to the fact that he had filed an initial application for a Canada Pension Plan disability pension in 2012. Additionally, the Appellant submits that he began receiving a retirement pension before he turned 60 years of age. From this, I understand that the Appellant essentially submits that the Respondent erred in paying him an early retirement pension in July 2012, and that the early payment of a retirement pension subsequently affected his ability to cancel it in favour of a disability pension.

[12] The Social Security Tribunal provided the Respondent with a copy of the notice of appeal. The Respondent did not file any submissions in these proceedings.

GROUNDS OF APPEAL

[13] Subsection 58(1) of the DESDA sets out the only grounds of appeal. They are as follows:

(a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

ISSUE 1: IS THE APPEAL *RES JUDICATA*?

[14] The Respondent denied the Appellant's first application for a disability pension under the *Canada Pension Plan*. The Appellant did not seek a reconsideration of the denial of this application. He filed a second application for a disability pension in October 2013. This raises the issue as to whether this second application could be considered *res judicata,* as it had been determined once previously by the Respondent.

[15] If a matter is properly *res judicata*, it precludes the rehearing or re-litigating of matters that have been previously decided with finality, and a litigant is "estopped" by the previous proceeding. In *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, the Federal Court wrote that:

> [89] *Res judicata* is a rule of evidence and a part of the law of estoppel. Generally speaking, the law of estoppel prevents parties from proceeding with certain actions. Res judicata stands for the concept that once a dispute has been decided with finality, it cannot be re-litigated; see the decision in *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44 (CanLII), [2001] 2 S.C.R. 460 at paragraph 20. When *res judicat*a applies, a litigant is "estopped" by the previous proceeding.

[16] In *Danyluk v. Ainsworth Technologies Inc.,* [2001] 2 S.C.R. 460, the Supreme Court of Canada listed the three preconditions to the operation of issue estoppel (a form of *res judicata),* which had been set out by Dickson J. (later C.J.) in *Angle v. Minister of National Revenue,* [1975] 2 S.C.R. 248:

(a) that the same question had been decided;

(b) that the judicial decision which is said to create the estoppel was final; and

(c) that the parties to the judicial decision were the same person as the parties to the proceedings in which the estoppel is raised.

[17] In *Canada (Minister of Human Resources Development) v. MacDonald*, 2002 FCA 48, the Federal Court of Appeal held that the doctrine of *res judicata* applies to decisions of the Minister, Review Tribunal and Pension Appeals Board (now the General Division and Appeal Division, respectively) under the *Canada Pension Plan*, subject to any statutory provisions to the contrary. *MacDonald* has been followed by the Federal Court of Appeal in *Canada (Minister of Human Resources Development) v. Fleming*, 2004 FCA 288 and by the Federal Court in *Vuong v. Canada (Attorney General)*, 2007 FC 699.

[18] In *Boucher v. Stelco Inc*., [2005] 3 SCR 279, 2005 SCC 64 at para. 32, the Supreme Court of Canada set out the scope of application of the doctrine of *res judicata*. The Court determined *that res judicata* applies not only to judicial decisions, but also to decisions of administrative tribunals and bodies. The Court stopped short of extending the doctrine to decisions of Ministers or similarly placed officials. LeBel J. wrote:

> Lastly, the principle of *res judicata* applies not only to the decisions of courts, but also to the decisions of administrative tribunals and bodies …

[19] The Federal Court in *Vuong* for whatever reason did not cite nor refer to *Boucher*.

[20] I am bound to follow *Boucher*. The doctrine of *res judicata* does not appear to extend to decisions of the Respondent Minister, given the language used by the Supreme Court of Canada. While the Minister may perform an adjudicative role of sorts, it does not arise out of nor is connected to any judicial or quasi-judicial function. The Minister's decisions do not fall within the parameters set out by the Supreme Court of Canada. For this reason, it seems that the doctrine does not apply in the circumstances where the Minister made a previous decision, and an appellant did not seek a reconsideration or an appeal to the Review Tribunal or General Division, as the case may be.

[21] I note in any event that in its initial decision, the Minister does not appear to have directed itself to the issue or question raised by the Appellant, i.e. whether the retirement pension should have first become payable before the Appellant reached 60 years of age, if it is assumed that he was indeed born in August 1952. Even if the doctrine extended to decisions of the Respondent, it cannot be said on the facts of this case that the matter is *res judicata*, as it had not been previously properly determined.

ISSUE 2: DID THE GENERAL DIVISION ERR IN CHOOSING TO SUMMARILY DISMISS THE APPELLANT'S APPEAL?

[22] The Appellant did not address the issue of the appropriateness of the summary dismissal of his appeal before the General Division, but I will nonetheless briefly address it.

[23] Subsection 53(1) of the DESDA requires the General Division to summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success. If the General Division either failed to identify the test or misstated the test altogether, this would qualify as an error of law.

[24] Here, the General Division correctly stated the test for a summary dismissal by citing subsection 53(1) of the DESDA at paragraph 6 of its decision. It is insufficient, however, to simply recite the test for a summary dismissal set out in subsection 53(1) of the DESDA, without properly applying it. Having correctly identified the test, the second step required the General Division to apply the law to the facts.

[25] In determining the appropriateness of the summary dismissal procedure and deciding whether an appeal has a reasonable chance of success, a decision-maker must determine whether there is a "triable issue" and whether there is any merit to the claim. As long as there is an adequate factual foundation to support an appeal and the outcome is not "manifestly clear", then the matter is not appropriate for a summary dismissal. A weak case is not appropriate for a summary disposition, as it necessarily involves assessing the merits of the case and examining the evidence and assigning weight to it.

[26] The General Division found that it was empowered only to the extent of its governing statute and that it was required to interpret and apply the provisions as set out in the *Canada Pension Plan.* The General Division found the provisions of the *Canada Pension Plan* to be clear and the evidence unequivocal. The General Division also noted that it did not have the jurisdiction to consider humanitarian and compassionate considerations.

[27] The General Division found that there was no chance for the Appellant to succeed on an appeal, given the law and the facts. Had the parties agreed to the facts and the applicable law, there might not have been a question as to the appropriateness of the summary dismissal procedure, but here, the Appellant alluded to a potential factual and legal issue which the General Division did not address. The Appellant alleged that the Respondent mistakenly paid him a retirement pension before he attained sixty years of age. He questioned whether there were any implications resulting from the early payment of a retirement pension. This in turn raised questions as to how subsection 66.1(1.1) of the *Canada Pension Plan* ought to be interpreted.

[28] Given that there was a dispute between the parties in the essential facts (i.e. the Appellant's birthdate) before the General Division which could have affected the Appellant's ability to cancel his retirement pension in favour of a disability pension, the matter ought not to have been summarily dismissed. On the basis of the error of law alone, the decision of the General Division cannot stand.

ISSUE 3: DID THE GENERAL DIVISION ERR IN DETERMINING THAT THE APPELLANT WAS UNABLE TO CANCEL HIS RETIREMENT PENSION IN FAVOUR OF A DISABILTY PENSION?

[29] Setting aside the issue of the appropriateness of summarily dismissing the appeal, I will consider whether, as the Appellant alleges, the General Division erred in determining that he had passed the 15-month timeframe within which he could cancel his retirement pension in favour of a disability pension.

[30] Subsection 66.1(1.1) of the *Canada Pension Plan* indicates that cancellation of the retirement benefit is not available when an applicant is in receipt of a retirement benefit and the applicant is deemed to have become disabled in or after the month in which the retirement pension first became payable.

[31] In its request of June 4, 2015 to dismiss the appeal, the Respondent submitted that the Pension Appeals Board had found that subsection 6.1(1.1) is clear and unequivocal and that the provisions of the *Canada Pension Plan* allowing for the cancellation of retirement benefits in favour of a disability pension are not flexible: *Minister of Social Development v. R. Desjardins* (October 5, 2006), CP23966, at paras. 17 to 19 and 21. The Pension Appeals Board determined that where a claimant was already in receipt of a Canada Pension Plan retirement pension for more than 15 months prior to applying for a disability pension, he could not cancel the retirement pension. While decisions of the Pension Appeals Board are not binding on me, they are of some persuasive value and I find that, in the circumstances where an applicant is in receipt of a retirement pension and he is deemed to have become disabled in or after the month in which the retirement pension first became payable, he cannot cancel the retirement pension.

[32] The General Division required the Appellant to demonstrate that he was deemed to be disabled before the month in which he began receiving payment of a retirement pension. Here, the Appellant commenced receiving payment of the retirement pension in July 2012. The General Division determined that the Appellant had to have been deemed to have become disabled prior to July 2012, to cancel the retirement pension. As the Appellant's application for a disability pension was received in October 2013, the earliest date that he could be deemed to have become disabled was July 2012, and therefore the General Division found that he could not cancel the retirement pension.

[33] As the Federal Court suggested in *Dube v. Canada (Attorney General),* 2016 FC 43, there are some occasions whereby the Appeal Division ought not to deferentially rely on the conclusions made by the General Division. That applies in this instance, where the basic factual assumption or underpinning upon which the General Division drew its conclusions appeared to be unfounded. The General Division appears to have accepted that

the Appellant should have been paid a retirement pension commencing in July 2012, based on the assumption that he had to have turned 60 in or before July 2012. The General Division appears to have overlooked the fact that the Appellant has consistently stated throughout that he was born in August 2012 and commenced receiving the retirement pension before he attained sixty years of age.

[34] The language in subsection 66.1(1.1) of the *Canada Pension Plan* indicates that one of the operative dates is when the "retirement pension first became payable", as distinct from when the retirement pension is actually paid. This distinction is critical in the circumstances of this case. Ordinarily, the two dates should coincide, but the Appellant states that he was born in August 1952, and not August 1951 as the Respondent's records indicate. Depending upon the Appellant's actual birthdate, the date when the retirement pension first became payable may differ from when the retirement pension was actually paid. To be clear, I make no findings on the Appellant's actual birthdate, but whatever it might be could be determinative of whether the Appellant can cancel his retirement pension in favour of a disability pension, given the language in subsections 66.1(1) and 67(2) of the *Canada Pension Plan.*

[35] Subsection 66.1(1.1) of the *Canada Pension Plan* reads:

> 66.1(1.1) *Exception* – Subsection (1) does not apply to the cancellation of a retirement pension in favour of a disability benefit where an applicant for a disability benefit under this Act or under a provincial pension plan is in receipt of a retirement pension and the applicant is deemed to have become disabled for the purposes of entitlement to the disability benefit in or after the month for which the retirement pension <u>first became payable</u>. (My emphasis)

[36] Subsection 67(2) of the *Canada Pension Plan* indicates that retirement benefits are payable commencing with the latest of:

> (a) the month in which the applicant reached sixty of years of age,
>
> (b) the month following the month in which the applicant applied, if he was under seventy years of age when he applied, . . .

(h) the month chosen by the applicant in his application.

[37] I have not been provided with a copy of the Appellant's application for a retirement pension, though assume that the Appellant did not specify when the retirement pension should commence.

[38] Although the Appellant may have begun receiving payment of the retirement pension in July 2012, they were in fact not payable to him under subsection 67(2) of the *Canada Pension Plan* until the month in which he reached sixty years of age, which in this case would be August 2012 (assuming that he was indeed born in August 1952).

[39] Had a retirement pension been payable commencing in August 2012, then the Appellant may well have been within the 15-month timeframe within which he could cancel his retirement pension in favour of a disability pension when he applied for a disability pension in October 2013 and requested a cancellation of the retirement pension, as the latest he could have been deemed to have been disabled would have been July 2012. This was the month before he reached sixty years of age and when the retirement pension was to have commenced being payable.

[40] If, on the other hand, the Respondent is correct that the Appellant was born in August 1951, then the retirement pension would have been payable commencing "the month following the month in which the applicant applied", i.e. in July 2012. He would have had to have been deemed disabled prior to July 2012, but as the application for a disability pension was made in October 2013, the earliest date he could be deemed disabled would be July 2012. In other words, if the birthdate of August 1951 is accurate, then the Appellant remains outside the 15-month timeframe within which he can cancel the retirement pension in favour of a disability pension.

[41] In summary, the Appellant's ability to cancel his retirement pension in favour of a disability may be contingent upon his actual date of birth.

[42] It seems that a birth certificate or some other acceptable document should verify the Appellant's true birthdate. If indeed the Appellant's birthdate is August 1952, then there was an error on the part of the Respondent in having commenced a retirement

pension in July 2012. If so, this might necessitate repayment by the Appellant for that month of payment, irrespective of whether he is ultimately found entitled to receive a Canada Pension Plan disability pension.

[43] The General Division erred in failing to verify the Appellant's birthdate. If the Appellant is able to establish his birthdate as August 1952, then the General Division based its decision on an erroneous finding of fact that it made without regard for the material before it, when it failed to consider the Appellant's stated birthdate, in determining whether he could cancel the retirement pension in favour of a disability pension.

OTHER CONSIDERATIONS

[44] In addition to verifying his birthdate, the Appellant would also need to establish that he was disabled by his minimum qualifying period and that he has been continuously disabled since then, to cancel the retirement pension in favour of a disability pension.

[45] The General Division did not address the issue as to whether there was sufficient evidence to establish that the Appellant could be found disabled for the purposes of the *Canada Pension Plan* by his minimum qualifying period of December 31, 2011. The Respondent had submitted before the General Division that the Appellant worked until August 21, 2013. The Appellant's own Questionnaire also indicates that he worked until May 22, 2012. However, without a proper and full airing of the evidence, I cannot draw any conclusions as to whether the Appellant worked beyond his minimum qualifying period. After all, the Appellant might have additional evidence to address whether any employment after his minimum qualifying period of December 31, 2011 might qualify as a substantially gainful occupation.

[46] I decline to make any findings on the issue as to whether the Appellant could be found disabled on or before his minimum qualifying period of December 31, 2011, as this would usurp the role of the General Division as the trier of fact.

CONCLUSION

[47] For the reasons set out above, the Appeal is allowed and the matter referred to the General Division for a full reconsideration as to whether the Appellant can cancel his retirement pension in favour of a disability pension.

[48] The Appellant is granted leave to file any additional medical or business records, along with updated submissions, subject to any directions or orders made by the General Division.

[49] The matter is referred to a different Member of the General Division.

Janet Lew
Member, Appeal Division